

The International Criminal Court and the Superior Orders Defence

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Introduction

On 1 July 2002 the *Rome Statute of the International Criminal Court (ICC Statute)*¹ came into force. Many commentators heralded this event as a significant development in the fight to bring the perpetrators of the most serious international crimes to justice. The establishment of a permanent court with the jurisdictional and investigative powers to pursue and punish these perpetrators was seen as a major step forward in replacing the culture of impunity that has characterised these crimes with a culture of accountability.

Article 33 of the *ICC Statute* enables those standing trial before the International Criminal Court (the ICC) to argue the defence of superior orders. Several state parties along with human rights' organisations and other non-government organisations (NGOs) protested the inclusion of this defence. It was perceived as a weakness in the *Statute*; one that would ultimately hinder the ability of the ICC to prosecute those responsible for the most serious international crimes.

The central unifying theme of these criticisms is that the inclusion of the defence in the *ICC Statute* represents a regression in the development of international criminal law. This argument is based on a time line that sees the development of a prohibition on the superior orders defence that begins with the Nuremberg Charter. This prohibition was then reinforced by the International Military Tribunal in Tokyo, the Control Council in post war Germany, several United Nations Security Council Resolutions, and most recently the charters of the International Criminal Tribunals for Yugoslavia and Rwanda. According to many commentators, the gradual evolution of the strict liability approach, which began with Nuremberg is

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¹ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, [2002] ATS 15, (entered into force 1 September 2002) ('*ICC Statute*').

seriously threatened by the inclusion of the superior orders defence in the *ICC Statute*.

It is this contention – of a gradual but inevitable evolution away from the conditional liability approach in force before Nuremberg towards the strict liability approach established in 1945 – which this paper will contest. Rather than a gradual but inevitable evolution towards strict liability, a more accurate analysis must acknowledge that there has been a great deal of uncertainty, inconsistency and contradiction relating to the defence of superior orders and its application in international criminal tribunals. These discrepancies mean that it is unreasonable to suggest that the movement from strict liability in the Nuremberg Charter to the conditional liability found in the *ICC Statute* is a simple regression brought about by the Realpolitik manoeuvring of the states negotiating the *ICC Statute*.

A more complex and effective analysis of the interpretation of the superior orders defence in 20th Century international criminal law, must acknowledge both the complex historical contingencies that lead towards the development of strict liability in the Nuremberg Charter and subsequent international instruments, and the consistently irregular findings made by courts and tribunals operating under charters that expressly or by implication prohibit the defence of superior orders. It is only by acknowledging these complexities that a more sustainable argument can be formulated for the development of a powerful, justiciable international criminal law.

The Defence

Criminal law defences, in the domestic and international sphere, are always controversial and lend themselves to speculation, simplification and occasionally scare mongering. Given the seriousness of the crimes that are likely to be brought to the attention of the ICC, it is easy to see why defences to these crimes are particularly likely to generate concern among organisations and individuals who are keen to see the most serious international criminals brought to justice. Article 33 of the *ICC Statute* is no exception. The Article sets out the defence of ‘Superior orders and prescription of law.’ It states:

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

- (a) The person was under a legal obligation to obey orders of the government or the superior in question;

(b) The person did not know that the order was unlawful; and

(c) The order was not manifestly unlawful.

2. For the purpose of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.²

Article 33, although admitting the defence of superior orders, does so in very limited circumstances and imposes a tripartite requirement of legal obligation, non-knowledge and non-apparent unlawfulness. McCoubrey describes this formulation as containing a 'strong presumption against the availability of a defence of superior orders.'³ Article 33(2) of the *ICC Statute* explicitly excludes genocide and crimes against humanity from the possible vitiating effects of the defence. Therefore, under the current *Statute* the defence of superior orders is open only to defendants who have been charged with war crimes offences under Article 8 of the *ICC Statute*.

This construction means that the conditional liability principle contained in this defence is very difficult to activate. Indeed, due to the wording of the *Statute* it is clear that the onus is on the defendant to successfully argue that they meet all the requirements necessary to activate the defence. It is quite easy to imagine the difficulties in establishing that a crime, which is of sufficient gravity to be brought before the ICC, is not manifestly unlawful. Despite this limited application of the principle of conditional liability, there is still a concerted effort by many concerned parties to have this conditional liability replaced with the absolute liability that was initially enshrined in Article 8 of the Nuremberg Charter.⁴

The Criticisms

In general, the coming into force of the *ICC Statute* was met with international acclaim and goodwill. In a quote that received global media exposure, Kofi Annan announced:

Our hope is that, by punishing the guilty, the ICC will bring some comfort to the surviving victims and to the communities that have been targeted. More important, we hope it will deter future war criminals, and bring nearer the

² *Rome Statute*, opened for signature 17 July 1998, [2002] ATS 15, art 33 (entered into force 1 September 2002).

³ Hilaire McCoubrey, 'From Nuremberg to Rome: Restoring the Defence of Superior Orders' (2000) 50 *International and Comparative Law Quarterly* 386, 394.

⁴ 'Charter of the International Military Tribunal' annexed to *Agreement for the Prosecution of Major War Criminals of the European Axis*, (London Agreement), 8 August 1945, 82 UNTS 279, art 8.

day when no ruler, no junta and no army anywhere will be able to abuse human rights with impunity.⁵

The media and other commentators around the world shared these high hopes. The Africa News Service published a story that encapsulated the positive reception that the activation of the *ICC Statute* generated. In part it read:

From this Monday (July 1) onwards, there is in place an international instrument which could break the logic of years of occupation and human rights violations in Eastern Congo, the International Criminal Court.⁶

Despite this general air of goodwill some groups were unhappy with the inclusion of the defence of superior orders in the *ICC Statute*. Human Rights Watch has been outspoken in its criticism of the inclusion of the defence. In a comment on the *Draft International Criminal Court Bill 2000* (UK), the United Kingdom *ICC Statute* implementation legislation, Human Rights Watch made it very clear that they believed that the British government should eradicate the defence of superior orders from its legislation as it was a flaw in the *ICC Statute* that should not be replicated. In a short report, Human Rights Watch devoted a significant portion of its argument towards the exclusion of the superior orders defence. In part, the report reads:

The principle that there can be no defence of superior orders is well established under international law. This principle was incorporated into Article 8 of the Nuremberg Charter, which explicitly prohibited the application of superior orders as a defense. The specific exclusion of the defence has been expressed in other, subsequent international instruments such as the Convention against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment (Convention Against Torture), the Statutes for the International Criminal Tribunal for Rwanda and the Former Yugoslavia and the Rome Statute. The Draft Bill should be amended to explicitly provide that the defence of superior orders is not available for the crimes set out in the bill.⁷ (Footnotes omitted).

Amnesty International has also been vocal in its opposition to the defence of superior orders. In a discussion of their support for the International Criminal Court written prior to the conclusion of the *ICC Statute*, Am-

⁵ Kofi Annan, *Overview of the Rome Statute of the International Criminal Court* (2002) United Nations <www.un.org/News/facts/iccfact.htm> at 13 February 2002.

⁶ Editorial, 'Be Warned: ICC Will End Impunity in Congo' *The East African*, 1 July 2002.

⁷ Human Rights Watch, *Comments on the Draft International Criminal Court Bill 2000* <http://www.hrw.org/campaigns/icc/docs/submission_UK.pdf> 24 February 2003.

nesty International made an impassioned plea for the negotiating states to refuse to admit the defence of superior orders. Amnesty wrote:

One defence which must be excluded is the defence of superior orders ... The Nuremberg Tribunal rejected the defence of superior orders under Article 8... Allied Control Council Law No. 10 and the Yugoslav and Rwandan Statutes exclude the defence of superior orders in similar terms.⁸

These two quotes are typical of the criticisms of the inclusion of the defence in the *ICC Statute* because they adopt the oversimplified time line of progression from Nuremberg in 1945 up until a sudden regression beginning in Rome in 1998. This polarisation of the issue clearly makes the validity of their case appear, in the first instance, more robust and engaging. By plotting the course of the evolution of international criminal law regarding the defence of superior orders on this value laden, simplified time line, those criticising the inclusion of the defence produce a case that seems as conclusive as it is commendable.

Is the Inclusion of the Superior Orders Defence Really a Step Backwards?

A closer examination of the development of the superior orders defence in international criminal law seriously questions the persuasive time line on which most criticisms of Article 33 are based.

Article 8 of the Charter of the International Military Tribunal at Nuremberg expressly rejected the defence of superior orders. The Article reads:

The fact that the defendant acted pursuant to orders of his government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the tribunal determines that justice so requires.⁹

This principle was reaffirmed by Article 6 of the Charter of the International Military Tribunal (Far East) at Tokyo, which states:

Neither the official position at any time, of an accused, nor the fact that an accused acted pursuant to orders of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in

⁸ Amnesty International, *Amnesty International: For an International Criminal Court* (1998) <www.amnesty.it/campaign/icc/library/aidocs/IOR400197_6.html> 24 February 2003.

⁹ 'Charter of the International Military Tribunal' annexed to *Agreement for the Prosecution of Major War Criminals of the European Axis*, (London Agreement), 8 August 1945, 82 UNTS 279, art 8.

mitigation of punishment if the Tribunal determines that justice so requires.¹⁰

Once this principle had been embedded in the charters of these two tribunals it was consequently approved by the Four Occupying powers in Germany in Control Council Law No. 10, which declared:

The fact that any person acted pursuant to the order of his government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation.¹¹

This principle of excluding the complete defence of superior orders was then carried over to the International Criminal Tribunals for Yugoslavia (ICTY) and Rwanda (ICTR). Article 7(4) of the *Statute of the International Criminal Tribunal for Yugoslavia*¹² and Article 6(4) of the *International Criminal Tribunal for Rwanda*¹³ both expressly reject the defence.¹⁴

Given the above discussion, it is easy to see why NGO's such as Human Rights Watch and Amnesty International are concerned that Article 33 of the *ICC Statute* represents a regression in the development of international criminal law. However, a closer examination of the case law surrounding these Articles and the majority of academic research examining the negotiation of Article 33 reveal a situation that is not nearly so clear.

Most academic analysis concerning the significance of Article 33 of the *ICC Statute* or the customary international law regarding the superior orders defence, acknowledges that the issue is at best not clearly decided, and at worst, irreconcilably divided. Even Amnesty International has admitted that when examining the judicial practice regarding superior orders rather than the statutory proclamations it is obvious that:

¹⁰ *Charter of the International Military Tribunal for the Far East*, (19 January 1946), 4 Bevans 20, 27, art 6.

¹¹ Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Crimes Against Humanity, (20 December 1945) 3 Official Gazette Control Council for Germany 50-55 (1946), art II 4(b).

¹² *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, UN Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, UN Doc S/RES/827 (1993), art 7(4).

¹³ *Statute of the International Tribunal for Rwanda*, adopted by S.C. Res. 955, UN SCOR, 49th Sess., 3453d mtg. at 3, UN Doc. S/RES/955 (1994), 33 ILM 1598, art 6(4).

¹⁴ Kriangsak Kittichaisaree, *International Criminal Law* (2001) 266.

Subsequent interpretation of this principle by courts and commentators is not consistent.¹⁵

Other commentators have also acknowledged how the courts have actually treated the defence of superior orders, regardless of the relevant statutory articles, and have been even more forthcoming in their assessment of the uncertainty surrounding the state of customary international law in this area. Writing in the 1960's, Dinstein was critical of the editors of the Law Reports of the United Nations War Crimes Commission for attempting to 'reconcile the irreconcilable' when they glossed over the different approaches taken by national and international courts regarding the defence of superior orders.¹⁶ These editors believed that the difference between conditional and absolute liability approach was not significant enough to acknowledge as two separate schools of thought. Dinstein thought this was a serious error of judgement and the ensuing argument, still going on thirty years later, would seem to suggest that he was right. Later authors have been less critical, but have nonetheless doubted the actual relevance of the defence of superior orders in Nuremberg and all other international criminal tribunals since that court, and in the case law practised by national courts. Discussing the defence of superior orders, Gaeta notes that the:

Case law and the legal literature have never clarified the content of the customary rule on this matter.¹⁷

Along the same lines McCoubrey argues that:

In fact both the formerly received 'Nuremberg' doctrine and the appearance of radical change, or reversion, in the 1998 Statute can be argued to be erroneous.¹⁸

As the above quotes suggest, there is a large gap between the certainty of the charters, prohibiting the defence of superior orders as outlined above, and the ambivalence of the case law dealing with the defence in tribunals governed by those same charters.

¹⁵ Amnesty International, above n 8.

¹⁶ Yoram Dinstein, *The Defence of Obedience to Superior Orders in International Law* (1965) 125.

¹⁷ Paola Gaeta, 'The Defence of Superior Orders: The Statute of the International Criminal Court versus Customary International Law' (1999) 10 *European Journal of International Law* 172.

¹⁸ McCoubrey, above n 3.

Why Prohibit the Defence of Superior Orders?

From the outset, the prohibition on the superior orders defence was a contentious issue. Rather than a principled and conscious evolution of international criminal law, legal examination of the evolution of the Nuremberg Charter suggests that the prohibition of the defence was adopted partly as a reaction to the unique circumstances that led to the formation of the court. Several factors present in the factual matrix surrounding the foundation of the Nuremberg Charter lent themselves to a prohibition of the defence. These included the fact that all the crimes listed in the Charter would fail the 'ought to know' test of manifest illegality that was acknowledged as the dominant customary international law in force prior to 1945. This means utilising the strict liability model in the case of war criminals from the Second World War was a legislative truism because all the crimes were manifestly illegal.

In the lead up to the formulation of the Charter, the decision to introduce an absolute liability approach and abolish the defence of superior orders was by no means unanimous. An examination of the historical record suggests that Article 8 of the Nuremberg Charter was equally as controversial as Article 33 of the *ICC Statute*. The original American draft Article contained the defence of superior orders, albeit in limited circumstances. The Article read:

In any trial before an international military tribunal the fact that a defendant acted pursuant to an order of a superior or government sanction shall constitute a defence per se, but may be considered either in defence or in mitigation of punishment if the tribunal determines that justice so requires.¹⁹

Several commentators believe that given this sentiment by the United States and other allied powers, it was only an acknowledgement of the unique facts that led to the adoption of the absolute liability approach contained in Article 8 of the Nuremberg Charter. In other words, it was not a belief that the absolute liability approach was legally and morally superior that led to its adoption. The Soviet representative at the London Conference in 1945, General Nikitchenko, summed up the rationalisation behind the adoption of the absolute liability approach when he asked the other delegates at the conference:

¹⁹ Report of Robert H Jackson, United Nations Representative to the International Conference on Military trials, 1949 at 22, cited in Howard S Levie, 'The Rise and Fall of an Internationally codified Denial of the Defence of Superior Orders' (1991) 31 *Revue Internationale de Droit Militaire et de Droit de la Guerre*, 183.

Would it be proper really in speaking of major criminals to speak of them as carrying out some order of a superior? This is not a question of principle really, but I wonder if that is necessary when speaking of major criminals?²⁰

This point is picked up by many of the commentators who are supportive of the move by the ICC to adopt a conditional liability approach to the defence of superior orders. Not surprisingly, a colonel in the United Kingdom Army Legal Service was eager to point out in an article he wrote on the development of the defence of superior orders that:

At Nuremberg itself, the crimes alleged were of such a magnitude that the absolute nature of the denial of the superior orders difference made little or no difference.²¹

In addition to the vicious nature of the crimes charged and the limited spectrum of crimes for which one could be convicted at Nuremberg and in other post Second World War tribunals, the split between the nationality of the defendants and the nationalities of the people sitting in judgement of the accused suggests that the precedent set in London in 1945 is not as persuasive an agreement as one made by states who are, in principle, subject to the jurisdiction of the court they are establishing.²² Gaeta writes:

Arguably, one of the reasons why this principle was proclaimed and applied at the international level was that the relevant statutes of the various international criminal tribunals provided for the prosecution and trial of non nationals of the states establishing those tribunals.²³

It is worth noting here that this fault is equally applicable to the ICTY and the ICTR. This contention goes some way to explaining why the U.S. position was rejected in 1945 despite their influence. Moreover, it explains why the prohibition of the defence could continue to stand despite ongoing pressure from the U.S. and other powerful states. For example, in the lead up to the establishment of the ICTY, Madeline Albright, representing the United States, told the United Nations Security Council that the U.S. government position was as follows:

It is, of course, a defence that the accused was acting pursuant to orders where he or she did not know that the orders were unlawful and a person of ordinary sense and understanding would not have known the orders to be unlawful.²⁴

²⁰ Ibid, 367-368.

²¹ Charles Garraway, 'Superior orders and the International Criminal Court: justice delivered or justice denied' (1999) 81 *International Review of the Red Cross* 785, 789.

²² Gaeta, above n 17, 179.

²³ Ibid.

²⁴ Statement of Ambassador Madeline Albright, UN Doc SPV. 3217, 25 May 1993.

In summary, McCoubrey points to the unique factual situation as the possible source of the Nuremberg Charter prohibition. He writes:

The Charter of the IMT at Nuremberg correctly applied pre-existing doctrine in extreme and unusual circumstances but was mistakenly taken to have developed a new approach which was then applied with potentially distorting effect for the generality of circumstances.²⁵

This uncertainty about the relevance and actual effect of the Article and the ensuing prohibition on the defence of superior orders is not just academic. According to one commentator, the status and significance of Article 8 of the Nuremberg Charter was also the subject of considerable debate in the initial Ad Hoc Committee meetings leading to the drafting of the *ICC Statute*.²⁶ An examination of the travaux préparatoires shows that when discussing the application of the superior orders defence to the crime of genocide, the parties debated how influential Article 8 of the Nuremberg Charter should be. According to Schabas, several nations suggested that the Nuremberg Charter should be excluded because of the uniqueness of the facts that led to its drafting. Most significantly, Schabas notes:

China agreed [with Venezuela regarding a conditional liability approach] citing the danger of injustice, and saying that Nuremberg was a special case.²⁷

Clearly, if the decision to prohibit the defence of superior orders in the Nuremberg Charter was a decision based solely on the unique factual matrix surrounding that tribunal at that particular time, then, in absence of that context, the reinstatement of the defence by the ICC is not a regression. This argument seriously undermines the theory that is popular among human rights NGOs; that there was a gradual evolution of international criminal law jurisprudence towards an absolute liability approach. However, this argument fails to take into account the evolutionary nature of international law and the debt that the development of law usually owes to historical contingencies. Simply because the Article 8 prohibition was brought about by extreme circumstances does not mean that the case is necessarily made out for a retreat back to conditional liability. Extreme circumstances usually give legislatures the courage to pass progressive legislation; the cessation of these circumstances does not legitimise its rollback. The unique factual matrix argument, which attempts to undermine criticisms of Article 33 is technically and logically sound, but fails

²⁵ McCoubrey, above n 3, 386.

²⁶ UN Doc. E/AC.25/SR.9, 8 in William A Schabas, *Obeying Superior Orders: Who is Responsible?* (2000) Fathom, <www.fathom.com/feature/121745> 17 February 2003.

²⁷ *Ibid.*

to address the assumption that the move towards the complete prohibition of the defence of superior orders is a positive evolution and one that is ethically and legally desirable.

The Inconsistencies between Statute and Case Law

Fortunately for the drafters of the *ICC Statute* this is not the only reason cited for the inclusion of the superior orders defence. The more convincing argument, and the one that gives a much more persuasive answer to the criticisms of Article 33, is that even when courts have operated under a charter that expressly prohibited the defence of superior orders, there were always cases where justice necessitated the use of the defence. A member of the UK delegation at the Diplomatic Conference on the Establishment of the International Criminal Court discussed this tension, writing:

Since 1945, the international community has struggled to find a way of reconciling the strict Nuremberg standard with the realities of military life as reflected in the various tribunal Judgements.²⁸

It is possible to trace a line of cases where courts and tribunals operating under charters that expressly exclude the defence of superior orders have, in principle, accepted the defence in contradiction to the charter they were formulated to implement.

Starting with the Nuremberg International Military Tribunal itself, it is possible to see the tension between the prohibition against the superior orders defence and the realities of military discipline and the contingencies of an army at war. Dinstein suggests that regardless of the wording of Article 8 of the Nuremberg Charter, the majority of prosecutors at the Tribunal maintained an attitude towards superior orders based on the conditional liability approach that was inconsistent with the spirit of Article 8 of the Nuremberg Charter.²⁹ This crack in the façade of an absolute prohibition of the defence of superior orders is heightened by an admission in the judgement in *United States v Wilhelm List et al* (the 'Hostage Case')³⁰ where the Nuremberg Tribunal decided:

We are of the view ... that if the illegality of the order was not known to the inferior, and he could not reasonably have been expected to know of its illegality, no wrongful intent necessary to the commission of a crime exists and the inferior will be protected. But the general rule is that members of the

²⁸ Garraway, above n 21, 788.

²⁹ Dinstein, above n 16.

³⁰ *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10* Vol. XI (1950) 1230, cited in Charles Garraway, above n 28, 786.

armed forces are bound to obey only lawful orders of their commanding officers and they cannot escape criminal liability by obeying a command which violates international law and outrages fundamental concepts of justice.³¹

This decision does not constitute a rejection of Article 8 to such a degree that it would constitute a judicial revolt, however it does point to a tension between the ideology of the Charter and the realities that judges must face in court. The fact that the judges in this case referred to the prohibition of the defence of superior orders as only a general rule rather than a strict rule, which a normal reading of Article 8 would convey, points to the fact that the realities of justice may mean that a strict prohibition of the defence of superior orders is in fact legally and ethically untenable. Fortunately, the Nuremberg Tribunal did not have to face the full extent of this legal dilemma because of the nature of the crimes and criminals they were dealing with as discussed above.

Later tribunals however, have had to face this dilemma and have struggled to maintain a consistent line regarding the reality of the defence of superior orders. Amnesty International describes the subsequent case law in this area as inconsistent and admits that tribunals have been forced to introduce qualifications to the rule that 'undercut its plain meaning'³² in an effort to get out of the bind created by the strict liability approach. Perhaps the most famous example of judicial activism in this area is the initial decision of the ICTY in *Prosecutor v Erdemovic*.³³ In the first instance the Tribunal decided:

The complete defence based on moral duress and/or a state of necessity stemming from superior orders is not ruled out.³⁴

The appeals chamber subsequently clarified the position of the ICTY regarding the absolute prohibition of the defence of superior orders but only did so in the second instance and with a significant amount of legal contortionism.³⁵ Once again, it is possible to perceive the tension between the two principles, the prohibition of the defence and the fundamental pursuit of justice. It is this consistent push by judges beholden to the absolute liability approach adopted in Nuremberg towards a conditional liability approach that sends a clear message that the conditional liability approach is actually the most justified and justiciable approach open to international

³¹ Ibid.

³² Amnesty International, above n 8.

³³ *Prosecutor v Erdemovic* (Case No IT-96-22-T) cited in William A Schabas above n 26.

³⁴ *Prosecutor v Erdemovic* (Case No IT-96-22-T), *ibid*.

³⁵ Ibid.

criminal law tribunals. This point is further emphasised by an examination of the domestic military law governing the nationals of many of the world's armies. The 1990 Dutch Law on Military Discipline, the 1992 German Military Manual, the Israeli Military Manual, the Italian Regulations for Military Discipline and the Swiss and United States Military Manuals all utilise the conditional liability approach regarding the defence of superior orders.³⁶

Conclusion

Despite the critical tone of this article, the evidence contained within it does not aim to completely discredit the push to introduce a strict liability approach to international criminal jurisprudence. A more accurate reading of this article would be to construe it as constructive criticism. If the ICC is to be successful at reducing the total number of victims who have to suffer serious international crimes, then the perpetrators of those crimes, soldiers or not, must be brought to justice. If this attitude erodes the hierarchical solidarity of the armed forces of this world, then this consequence may contribute to the ultimate goals of the International Criminal Court.

However, benign intentions do not legitimise the glossing over of historical contingencies and judicial realities. If the international community is to address the issue of superior orders effectively and in a manner that maximises the disincentive for people to commit war crimes, then it must do so in a manner that acknowledges the confusion from which an answer must flow. The international community must also generate a unified response that is sufficiently fluid and imaginative to side step the tension between justice for defendants and justice for victims that has up until now undermined any legislative prohibitions of the superior orders defence.

Given the current state of international criminal law in this area, it is clear that the International Criminal Court enshrined in its Charter a more realistic, enforceable and ultimately sustainable doctrine regarding superior orders. It is a stance that is not as potentially punitive as the charters of the international tribunals from Nuremberg through to Rwanda. However, due to the fact that Article 33 of the *ICC Statute* is more robust, and will ultimately lead to more certainty in the jurisprudence of the International Criminal Court, it does not represent a regression from the complete prohibition of the superior orders defence that many suggested it does. Arti-

³⁶ Amnesty International, above n 8.

Article 33 of the *ICC Statute* sacrifices the rhetorical claims of the previous international military tribunals, but enshrines a legitimate doctrine into international criminal law from which the difficult process of sustainable legal development can begin.